

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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VONAGE HOLDINGS )  
CORPORATION )  
 )

Petition for Declaratory Ruling )  
Concerning an Order of the Minnesota )  
Public Utilities Commission )  
\_\_\_\_\_ )

WC Docket No. 03-211

**COMMENTS OF THE HIGH TECH BROADBAND COALITION**

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Business Software Alliance  
Consumer Electronics Association  
Information Technology Industry Council  
National Association of Manufacturers  
Semiconductor Industry Association  
Telecommunications Industry Association

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**INTRODUCTION AND SUMMARY**

The High Tech Broadband Coalition (“HTBC”) hereby submits the following comments in response to the Federal Communications Commission’s (the “Commission’s”) request for comments on Vonage Holding Corporation’s (“Vonage”) Petition for Declaratory Ruling.<sup>1</sup> HTBC is an alliance of the leading trade associations of the computer, telecommunications equipment, semiconductor, consumer electronics, software, and manufacturing sectors.<sup>2</sup> HTBC is committed to the rapid and ubiquitous deployment of fast, interactive, content-rich, and affordable broadband services. HTBC believes that the best way to achieve universal adoption of broadband is through strong facilities-based competition. To facilitate competition and

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<sup>1</sup> See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Petition for Declaratory Ruling, WC Docket No. 03-211 (filed Sept. 22, 2003) (“Vonage Petition”).

<sup>2</sup> HTBC members include the following organizations: the Business Software Alliance, the Consumer Electronics Association, the Information Technology Industry Council, the National Association of Manufacturers, the Semiconductor Industry Association, and the Telecommunications Industry Association.

fairness among all broadband technology platforms, HTBC has called on policy makers to remove regulations that discourage investment and limit competition.

HTBC supports the development of Voice over Internet Protocol (“VoIP”) technology and innovative new VoIP services because they will advance the deployment and adoption of broadband. However, HTBC is greatly concerned that misclassification and inappropriate regulation of VoIP services by state commissions will stifle their development. HTBC therefore supports Vonage’s petition, which asks the Commission to preempt an order of the Minnesota Public Utilities Commission (“MPUC”) requiring Vonage – one of the new VoIP providers – to comply with state laws applicable to providers of “telephone service.”<sup>3</sup> Both as a matter of policy and as a matter of law, the MPUC’s decision to regulate Vonage as if it were a traditional common carrier was wrong – and it is important for this Commission so to declare.

Vonage clearly does not provide a “telecommunications service” under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”), or the Commission’s rules. Because Vonage performs a net protocol conversion on calls between Vonage customers and stations on the Public Switched Telephone Network (“PSTN”), Vonage provides an “enhanced service” that is free from common carrier regulation under Title II. Likewise, Vonage’s VoIP service does not comply with two of the four functional criteria that the Commission used to define “phone-to-phone” VoIP, or those VoIP services that *may* be regulated as “telecommunications services,” in the Universal Service Report to Congress.<sup>4</sup> If anything, Vonage’s VoIP service is best described as an Internet application that allows customers to communicate using the connectivity provided by their own Internet Service

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<sup>3</sup> See Vonage Petition at 1.

<sup>4</sup> See *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 (1998) (“Universal Service Report”).

Provider (“ISP”) and broadband connection. And, consistent with the Act and Commission precedent, providers of Internet applications are *not* subject to the common carrier regulations that are imposed on providers of “telecommunications services.”

Vonage also offers an interstate service that falls outside the jurisdiction of the MPUC or any other state commission. There is no way for Vonage to determine the physical location of its customers, so it is impossible for Vonage to determine the jurisdictional nature of any given call. The Commission has previously preempted state commission jurisdiction where, as here, it is impossible to separate a service into interstate and intrastate components and the amount of interstate traffic is not *de minimis*. Thus, regardless of the proper regulatory classification of Vonage’s VoIP service, the Commission should declare that it is an interstate service exempt from regulation by state commissions like the MPUC.

That Vonage was correct in seeking relief from this Commission has already been demonstrated by the recent ruling of the U.S. District Court for the District of Minnesota (the “Minnesota District Court”) permanently enjoining the MPUC from enforcing its order.<sup>5</sup> However, the Minnesota District Court Order has not rendered Vonage’s petition moot since the underlying issue raised – whether a state commission has authority to regulate Vonage’s VoIP service – is not only capable of repetition, it is now being repeated by states all across the country.<sup>6</sup> Many state commissions have either expressed their intent to regulate Vonage as a

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<sup>5</sup> *Vonage Holdings Corp. v. Minnesota Public Util. Comm’n*, Memorandum and Order, 2003 U.S. Dist. LEXIS 18451 (D. Minn.) (“Vonage Injunction Order”).

<sup>6</sup> In addition, the MPUC may still appeal the Minnesota District Court Order.

telecommunications carrier under state law,<sup>7</sup> or they have been asked to do so in response to the MPUC order.<sup>8</sup> Accordingly, the Commission should grant Vonage's request for a declaratory ruling that its VoIP service is an interstate "information service" that is not subject to state regulation. This will preempt the application of multiple, inconsistent regulations that are in direct conflict with the both the Act and Commission precedent.

Indeed, the Commission must recognize that the current lack of regulatory clarity for VoIP compounds the risk associated with network investment and product deployment. Thus, HTBC strongly encourages the Commission to initiate a broader proceeding to define the regulatory status of VoIP services and applications, and then determine what (if any) regulatory actions should be taken with regard to VoIP.

**I. VONAGE DOES NOT OFFER A TELECOMMUNICATIONS SERVICE SUBJECT TO STATE COMMON CARRIER REGULATION.**

As the Minnesota District Court has recently held, Vonage does not offer a "telecommunications service." Though Vonage's VoIP offering resembles traditional telephone service in some respects, the underlying technical and functional differences make clear that it is not a "telecommunications service" under the Act and the Commission's rules. Instead,

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<sup>7</sup> For example, on 22 September 2003, the Telecommunications Division of the California Public Utilities Commission sent a letter to Vonage and other VoIP providers stating that it had concluded that they are "offering intrastate telecommunications service for profit in California without having received formal certification from this Commission to provide such service," and directing them to "file an application with the Commission for authority to conduct business as a telecommunications utility no later than October 22, 2003." Other state commissions have opened generic investigations into the proper regulatory treatment of VoIP under state law. *See, e.g., In the Matter of the Investigation into Voice Over Internet Protocol (VOIP) Services*, Colorado Public Utilities Commission, Docket No. C03-0559; Docket No. 03M-220T; *In the Matter of the Commission's Investigation Into Voice Services Using Internet Protocol*, Public Utilities Commission of Ohio, Case No. 03-950-TP-COI; *Washington Exchange Carriers Ass'n v. Local Dial Corp.*, Washington Utilities and Transportation Commission, Docket No. UT-031472.

<sup>8</sup> *See Complaint of Frontier Telephone of Rochester, Inc. Against Vonage Holdings Corp. Concerning Provision of Local Exchange and Interexchange Telephone Service in New York State in Violation of the Public Service Law*, Case No. 03-C-1285 (filed Sept. 22, 2003).

“Vonage is an information services provider,” and “information services such as those provided by Vonage must not be regulated by state law....”<sup>9</sup>

Unlike a provider of “telecommunications services,” Vonage requires its customers to purchase broadband Internet access from a third-party provider and install special CPE that encodes voice communications as digital packets (or vice versa).<sup>10</sup> Once this equipment is configured, the customer can call anyone on the PSTN (or any other Vonage customer) by establishing a connection over the Internet to a Vonage server.<sup>11</sup> If a Vonage customer calls a station on the PSTN, Vonage performs a net protocol conversion from Internet Protocol (“IP”) to Time Division Multiplex (“TDM”), and terminates the call using the services of an unaffiliated common carrier.<sup>12</sup> Similarly, if a call originates on the PSTN, Vonage performs a net protocol conversion from TDM to IP, and terminates the call on the customer’s broadband connection.<sup>13</sup> In essence, “Vonage’s service provides an interface between the otherwise incompatible network protocols of the Internet and the PSTN.”<sup>14</sup> Vonage facilitates VoIP service using computerized media gateways to process the protocol conversions, and computer servers that set-up signaling and route packets between media gateways and other points on the public Internet.<sup>15</sup>

Thus, HTBC agrees with Vonage that “the distinguishing characteristic [of Vonage’s service] is the conversion of data to permit communication between users of the Internet and

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<sup>9</sup> Vonage Injunction Order, 2003 U.S. Dist. LEXIS 18451 at \*2.

<sup>10</sup> *See* Vonage Petition at 6.

<sup>11</sup> *See id.*

<sup>12</sup> *See id.* at 6, 7.

<sup>13</sup> *See id.* at 6.

<sup>14</sup> *Id.* at 13. On Vonage-to-Vonage calls, however, Vonage simply routes packets over the public Internet, and the call never travels on the PSTN. HTBC agrees with Vonage that this is a “computer-to-computer” service, as discussed in the Universal Service Report. *See id.* at 7.

<sup>15</sup> *See id.* at 7.

users of the PSTN.”<sup>16</sup> This net protocol conversion means that under the Commission’s long-standing rules, Vonage’s VoIP offering is an “enhanced service” free from Title II regulations applicable to providers of “telecommunications services.”<sup>17</sup> “Enhanced services” are defined by the Commission as “services, offered over common carrier transmission facilities used in interstate communications, which (1) employ computer processing applications, that act on the format, content, code protocol or similar aspects of the subscriber’s information; (2) provide the subscriber additional, different or restructured information; or (3) involve subscriber interaction with stored information.”<sup>18</sup> As the Minnesota District Court found, Vonage’s service satisfies the first part of this definition: because Vonage changes the form of the information sent and received by the end user (*i.e.*, from IP to TDM, and vice versa), it is an enhanced service.<sup>19</sup> And, of course, “enhanced services are not regulated under Title II of the Act.”<sup>20</sup>

Moreover, Vonage’s service does not fit within the definition of “telecommunications service” under the framework outlined in the Universal Service Report, in which the Commission addressed whether, and to what extent, VoIP services should be regulated as “telecommunications services.” In that report, the Commission said that a VoIP service should only be considered a “telecommunications service” if it satisfies a four-prong test: (1) the provider holds itself out as providing voice telephony or facsimile service; (2) the provider does *not* require the customer to use CPE different from that used to place an ordinary touch-tone call (or facsimile transmission) over the PSTN; (3) the provider allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated

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<sup>16</sup> *Id.*

<sup>17</sup> “Enhanced services,” and “information services” as defined by the Telecommunication Act of 1996, are essentially congruent and identical in scope, and are used synonymously in this comment. *See* Universal Service Report, 13 FCC Rcd. at 11511 (¶ 21).

<sup>18</sup> 47 C.F.R. 64.702(a).

<sup>19</sup> *See* Vonage Injunction Order, U.S. Dist. LEXIS 18451 at \*16.

<sup>20</sup> 47 C.F.R. 64.702(a).

international agreements; *and* (4) the provider transmits information without net change in form or content.<sup>21</sup> As the Minnesota District Court correctly held, Vonage’s VoIP service fails to satisfy both the second and fourth prongs of this test. First, the customer *must* use computer equipment that is *not* compatible with the PSTN – a traditional telephone simply will not work unless it is connected to hardware or software that generates digital packets.<sup>22</sup> Second, Vonage performs a *net* protocol conversion, transforming a communication from IP to TDM, and vice versa.<sup>23</sup> Under the paradigm laid out by the Commission in the Universal Service Report, it is clear that Vonage does not provide a “telecommunications service.”

Indeed, what Vonage provides its customers is most appropriately described as an Internet *application*. It is little different than applications such as web browsing, email, or instant messaging, which similarly take advantage of Internet access provided by an ISP. No one contends that ISPs providing instant messaging or email are providing anything other than an “information service,” even if the message includes voice or is routed to a cell phone. The fact that Vonage’s VoIP product sends voice packets rather than text packets does not turn this application into a “telecommunications service.” The Commission correctly decided in the Universal Service Report not to adopt an application-based approach that would evaluate each application running over Internet access separately from the underlying IP service itself.<sup>24</sup> The MPUC’s decision to regulate Vonage based on the functionality of its VoIP application is thus inconsistent with the Commission’s decision to regulate all IP-based Internet applications in the same manner, regardless of whether they transmit voice or text.

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<sup>21</sup> See Universal Service Report at 11543-44 (¶ 88).

<sup>22</sup> See Vonage Injunction Order, U.S. Dist. LEXIS 18451 at \*19.

<sup>23</sup> See *id.* at \*20.

<sup>24</sup> See Universal Service Report at 11539 (¶ 79). See also Vonage Injunction Order, 2003 U.S. Dist. LEXIS 18541 at \*24.

Finally, HTBC agrees that Vonage – similar to information services providers – “*uses* telecommunications to deliver information to its users... Vonage does not *provide* telecommunications,” so it is not subject to common carrier-type regulation.<sup>25</sup> The Universal Service Report said that common carrier regulation under Title II should be limited to the provider of the underlying transport, not an ISP or an Internet application provider that uses those transport facilities to serve its customers.<sup>26</sup> Vonage customers obtain broadband transmission capability from a third-party, so Vonage provides neither “telecommunications” nor “telecommunications service.”

## **II. VONAGE OFFERS AN INTERSTATE SERVICE NOT SUBJECT TO STATE JURISDICTION.**

Regardless of whether Vonage’s VoIP service meets the definition of “telephone service” under the laws of Minnesota or another state (and even without regard to whether it is an “information service” under the Act), state commission regulation should be preempted because Vonage offers an *interstate* service subject to federal jurisdiction. Internet services generally, and Vonage’s service in particular, cannot easily be separated into interstate and intrastate components. Recognizing this difficulty, the Commission has found that Internet traffic is interstate in nature, and therefore subject to FCC, not state, jurisdiction. This is because it is impossible to determine where transmissions over many common Internet applications (*e.g.*, web browsing) ultimately terminate, though it is often at distant locations (*e.g.*, a web site) outside the state (or nation) in which they originate.<sup>27</sup>

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<sup>25</sup> Vonage Petition at 13. *See also* Vonage Injunction Order, U.S. Dist. LEXIS 18451 at \*22 (“The FCC was aware of the relationship that information services providers often have with providers of telecommunications services, but recognized that the two should remain distinguishable.”).

<sup>26</sup> *See* Universal Service Report at 11546 (¶ 95)

<sup>27</sup> *See GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd. 22466, 22478-79 (¶ 22) (1998) (“GTE ADSL Order”).

The inherent portability of Vonage's service, which is made possible by IP-based technology that transmits voice communications over the Internet, exacerbates the difficulty in identifying the jurisdictional nature of a specific Internet transmission on a real-time basis. In some respects, Vonage's product is more like mobile services than traditional wireline service, which establishes a physical connection with the customer that enables a carrier to determine the jurisdictional nature of a particular call. Vonage's VoIP service, like commercial mobile radio services ("CMRS"), does not provide such a connection. Instead, customers can plug their special CPE into any Ethernet port connected to broadband connection, allowing a customer to use Vonage's product *anywhere*.<sup>28</sup> Thus, while a Vonage customer may have a Minnesota telephone number, a customer can use Vonage's service at home in Minneapolis or on a business trip in Miami. It is therefore impossible to determine the jurisdiction of any given call because Vonage does not know where the call originates.

Indeed, portability is one of the principal attributes of Vonage's service. Like CMRS, a Vonage customer can use this service anywhere. Imposing onerous jurisdictional tracking requirements on VoIP services would significantly diminish their functionality, or worse yet, erect a barrier to their deployment. For example, as Vonage explained in its petition, if it were obligated to comply with state 911 requirements that were designed for the PSTN it might have to discontinue intrastate service.<sup>29</sup> However, since Vonage cannot distinguish intrastate from interstate communications, it would inevitably "interfere[e] with Vonage's ability to provide at least some jurisdictionally interstate services over interstate communications facilities" because Vonage would be forced to block a substantial amount of interstate traffic.<sup>30</sup>

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<sup>28</sup> See Vonage Petition at 28.

<sup>29</sup> See *id.* at 29.

<sup>30</sup> See *id.*

In the past, the Commission has preempted state jurisdiction over services carrying “mixed” interstate and intrastate traffic when it is impossible to separate such traffic by jurisdiction. For example, in the GTE ADSL Order, the Commission found that a DSL product that permits ISPs to provide their customers with high-speed access to the Internet “is an interstate service and is properly tarified at the federal level.”<sup>31</sup> Though the Commission acknowledged that some Internet transmissions might originate and terminate in the same state, the Commission held that most communications will terminate at a distant location, either outside the state or the United States.<sup>32</sup> The Commission then used its “mixed use” rule, which allows the Commission to assert federal jurisdiction over private lines with jurisdictionally mixed traffic (so long as the interstate traffic is not *de minimis*),<sup>33</sup> to preempt state regulation of the rates, terms, and conditions of GTE’s DSL product.<sup>34</sup>

For the same reasons, Vonage’s VoIP service is an interstate service that falls outside state commission jurisdiction.<sup>35</sup> The underlying technology makes it impossible to determine the jurisdiction of a particular call, and clearly, more than a *de minimis* amount of traffic will be interstate given that Vonage markets its service as an “all distance” product providing local and long distance calling.<sup>36</sup> Therefore, the Commission should clarify that Vonage’s VoIP product is an interstate service subject to federal, not state, regulation. This will avoid the service blocking problems described above, and preserve the inherent portability of VoIP services – outcomes that best serve consumers.

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<sup>31</sup> See GTE ADSL Order, 13 FCC Rcd. at 22466 (¶ 1).

<sup>32</sup> See *id.* at 22476 (¶ 19).

<sup>33</sup> See *MTS and WATS Market Structure*, 4 FCC Rcd. 5660 (1989).

<sup>34</sup> GTE ADSL Order, 13 FCC Rcd. at 22481 (¶ 28).

<sup>35</sup> See Vonage Petition at 27-31.

<sup>36</sup> See *id.* at Attachment, Docket No. P6214/C-03-108, Exhibit 1.

## CONCLUSION

The growth of innovative new VoIP services will advance the adoption of broadband, providing enormous benefits to consumers and our national economy. Policymakers, at both the state and federal level, must exercise care not to stifle that growth – not only because of the benefits that have already been delivered, but because the potential of VoIP technology has only just begun to be tapped.

This is not to say that the growth of VoIP does not raise important public policy issues worthy of discussion. On the contrary, the growth of VoIP technology may help provide new solutions to important public safety, law enforcement, and national security concerns. But reflexively to label VoIP service as a traditional “telephone service” – subject to common carrier regulation that was developed for an entirely different network and an entirely different technology – is wrong as a matter of law and unwise as a matter of policy.

To allow this nascent and innovative technology to flourish, the Commission should promptly issue a declaratory ruling that Vonage’s VoIP service is not an intrastate “telecommunications service” and therefore cannot be regulated by the states. HTBC respectfully suggest that the Commission consider in a formal and deliberate proceeding what refinements to the existing federal regulatory regime are required to ensure that VoIP technology – in all its varieties – continues to develop, while providing solutions to vital public safety, law enforcement, and national security concerns.

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Respectfully submitted,

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